No. 80-1199

IN THE

Supreme Court of the

OCTOBER TERM,

THE AMERICAN TOBACCO C

v.

JOHN PATTERSON,

On Writ of Certiorari to th
Court of Appeals for the

BRIEF FOR PETITIONERS BAKE
AND TOBACCO WORKERS INTE
AND ITS LOCA

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WILSON - EPES PRINTING CO., INC. - 789-0096

QUESTION PI

Whether the immunity fro
to bona fide seniority systems
seniority systems instituted o
date of Title VII.

LIST

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the caption of the petiti
are:

The American Tobac
American Brands,
American Brands, In
Bakery, Confectioner
International Unio
Workers' Internati
with Bakery & Con
International Unio
union in 1978)
Local 182 of Bakery,
Workers Internati

The respondents are:

John Patterson
Marion Moshoe
Edmund Page
James Randolph
Percy Taylor
Equal Employment O

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district court to represen
American Tobacco Compa

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1199

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER UNIONS

This brief is the joint product of petitioners Bakery, Confectionery & Tobacco Workers International Union [1] and its Local 182 (hereinafter collectively "the Union"), and American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of national and international unions with which the Union is affiliated. The decision to file a single brief reflects the identity of their views on the issue presented, and their desire to minimize the burdens on the Court by stating their common position only once.

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[1] This suit was instituted against, *inter alia*, Tobacco Workers International Union and its Local 812. In 1978, Tobacco Workers International Union merged with Bakery & Confectionery Workers International Union to form the present Bakery, Confectionery & Tobacco Workers International Union

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Fourth Circuit which this Court has granted certiorari to review is reported at 634 F.2d 744, and the panel opinion that it replaced is reported at 586 F.2d 300. An earlier opinion of the Court of Appeals in this case is reported at 535 F.2d 257, *cert. denied*, 429 U.S. 920. Opinions of the district court in this case are reported at 8 FEP 778 (1974), 11 FEP 577 (1974), and 18 FEP 377 (1977). All of the afore-cited opinions are reprinted in the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1980. The petition for writ of certiorari was filed on January 16, 1981, and granted on June 15, 1981. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—

> (1) to exclude or to expel from its membe ship, or otherwise to discriminate against, an individual because of his race, color, religio sex, or national origin;
>
> (2) to limit, segregate, or classify its mem bership, or to classify or fail to refuse to refe for employment any individual, in any wa which would deprive or tend to deprive any i dividual of employment opportunities, or woul limit such employment opportunities or othe wise adversely affect his status as an employe or as an applicant for employment, because o such individual's race, color, religion, sex, o national origin; or
>
> (3) to cause or attempt to cause an employe to discriminate against an individual in viola tion of this section.

Section 703(h) of the Civil Rights Act of 1964, 4 U.S.C. § 2000e-2(h), provides in pertinent part a follows:

> Notwithstanding any other provision of this titl it shall not be an unlawful employment practice fo an employer to apply different standards of compen sation, or different terms, conditions, or privileges o employment pursuant to a bona fide seniority o merit system, or a system which measures earning by quantity or quality of production or to employ ees who work in different locations, provided tha such differences are not the result of an intentio to discriminate because of race, color, religion, se or national origin. . . .

STATEMENT OF THE CASE

Petitioner Local 182 is the exclusive bargaining repre sentative of employees at a number of plants of Peti tioner American Tobacco Company, including two sepa rate plants in Richmond, Virginia, which are the subjec of this action: the Virginia Branch (at which cigarette

are manufactured), and the Richmond Branch (at pipe tobacco is manufactured). Two separate were filed challenging employment practices at plants; one by the EEOC, and the other by five employees who were certified to represent a cl black employees at the plants. The actions wer solidated.

The case was initially tried prior to this Court' sion in *Teamsters v. United States*, 431 U.S. 324 time when the rule in the Fourth Circuit was tha VII invalidated innocently-motivated seniority s that perpetuated the effects of pre-Act discrimi (unless proved by the defendants to be a "business sity"). *Robinson v. Lorillard Corp.*, 444 F.2d 791 1972), *cert. dismissed*, 404 U.S. 1006. The district found that pre-Act discrimination was being unla perpetuated by the "facially fair and neutral" se system in two respects: (1) seniority was measu length of service within one's branch ("branch len service"), which deterred black employees from ferring from one branch to the other, and (2) there six lines of progression (LOPs) that were not justi business necessity and that, by requiring employ promote job-by-job, delayed the access of black emp to the jobs at the top of these LOPs. JA 2-11.[2] The of appeals affirmed these rulings, but remanded fo ther proceedings respecting remedy. JA 70-83. mand, the district court entered a judgment req *inter alia*, that blacks be permitted to carry their ity when transferring from the prefabrication d ment of one branch to the fabrication department other, and that the six LOPs be eliminated. JA 13

Following entry of that judgment, this Court d *Teamsters*, and the Company and Union moved

---

[2] There were nine LOPs, but the district court found tha were justified by business necessity. JA 31-32.

F.R.Civ.P. 60(b) for relief from the judgment. trict court denied the motion. JA 109-110. On a panel of the court below ruled (1) that the qu the legality of the contractual use of branch l service as the measure of seniority required, of *Teamsters*, more explicit findings from the court (which was free to reopen the record to further evidence as to *bona fides*), JA 117-118, that the lines of progression were not part of a ity system" within the meaning of § 703(h), so original holding that they were unlawful irresp motivation remained proper and was not vulnera Rule 60(b) motion, JA 116.[3]

The Company and Union filed petitions seeking ing *en banc*. While those petitions were pendi Court decided *California Brewers Assn. v. Bry* U.S. 598, giving a broader reading to the term " system" than had been applied in the panel

The *en banc* court ruled unanimously that on t tion of the legality of the use of branch length o as the measure of seniority the case had to be r and the record reopened to receive further evide *bona fides*. JA 145-147. That ruling is not be Court. The ruling which *is* before this Court is lating to the LOPs.

The majority of the *en banc* court held that t were unlawful whether or not they were in motivated, and whether or not they were part o iority system" within the meaning of § 703(h) tion the majority did not address, JA 142-14 because they were "adopted in January 1968," The court reasoned that § 703(h) is "a quite exception to Title VII's general coverage of al tions of employment' ", JA 144, n. 4, and "[i]n l that narrow interpretation" (*ibid.*) the panel

[3] Judge Widener dissented from the ruling respectin progression, JA 122-125.

concluded "that the legislative history of
conclusively demonstrates that Congress int
munity accorded seniority systems by § 7
only to those systems in existence at the
VII's effective date, and of course to ro
applications of such systems," JA 143-144

Judge Widener, joined by Judge Russ
Preliminarily, he noted his doubt as to th
of the majority's holding that § 703(h) i
to seniority systems adopted subsequent to
Title VII:

> The Supreme Court has specifically no
> *sters* that § 703(h) on its face immu
> fide seniority systems. 431 U.S. 348
> though § 703(h) is written as an exce
> as a grandfather clause, the majority
> ordinary exception into just that. Cong
> edly knows how to write a grandfathe
> wishes, but in this case wrote an exce
> New plants, for instance, are summa
> from § 703(h) in the majority view,
> justification." [JA 160, n. 1].

But the principal focus of his dissent wa
quacy of the record to support the majority'
the LOPs were "adopted in 1968". He note
trict court had made no findings on the po
that the record evidence appeared to indicat
larger number of LOPs (including these
isted in practice prior to the Act (albeit
prescribed in the collective bargaining ag
that in 1968 the parties had substantially
number of LOPs, with these six being a
surviving (JA 162-177). If this is correct,
1968 "change" benefited the black employe
duced the number of LOPs without crea
ones (JA 165-166, 182). In his view, a re
essary so that the district court could ma

the first instance as to whether that
reading of the record (JA 177).

The majority appended a footnote t
plaining its reasons for rejecting the
of a remand on this factual issue:

> Without attempting here an ex
> analysis of the factual record, our
> while the informal rudiments of
> scribed as a "job lines of progre
> tainly existed before 1965, the
> adopted by American in 1968 to
> and promotions within specifical
> "lines" involved enough of change
> (whether in favor of or against em
> to constitute a *new* policy, or at lea
> altered from prior unstructured p
> could not be considered simply a
> tion," see *Teamsters*, 431 U.S. at
> 1965 procedures. [JA 143, n.
> original].

The majority's implicit acknowledgm
"change" in 1968 may have been one
interests of minority employees, coupled
that that "change" withdrew the "immu
drew a rebuttal from Judge Widener:

> The only way the majority can fin
> record without further fact findin
> court is by giving such a "string
> § 703(h)] against the employer ar
> it actually finds liability when all
> the union tried to do was to imp
> conditions for the plaintiff class .
> remembered that *each relevant cha*
> *tive bargaining agreements disclos*
> *whether pre- or post-act, has bene*
> *class. None have been to its detri*
>
> . . . [T]he majority boldly holds
> a previously existing seniority sys

change may be in favor of a class
will deprive the company and th
change from the benefit of a

Nothing I can think of could b
in law or logic. [JA 182-183; em

---

[4] Judge Widener explained:

> The law . . . rejects this conclusion
> *v. Weber*, 443 U.S. 193 (1979), in wh
> court was that it was not a violation o
> Act for an employer and a union to ag
> minority employees. The court said th
> as a spur or catalyst to cause employ
> examine and self-evaluate their emplo
> endeavor to eliminate, so far as possi
> an unfortunate and ignominious page
> tory." 443 U.S. at 204. Thus, *Weber* a
> ployers and unions designed to allevi
> discriminatory conditions of employm
> majority opinion providing that a com
> not alter a seniority system so as to m
> conditions of employment of minority
> contrary to *Weber*, I think. It requires
> tion of the statute to hold that a senio
> discriminatory in effect, as in *Team*
> § 703(h) so long as it remains unchang
> in favor of the minority employees, the
> union lose their § 703(h) exemption.
>
> Not only is this conclusion contrary
> blow against minority employees and
> of the statute. Hereafter, in this circ
> employer nor a union may safely agr
> seniority system existing before July 1
> § 703(h) exemption will be lost. Thus
> rigid as the one approved in *Teamsters*,
> of white employees, under the provisio
> ceive the sanction of the statute and
> court, while a seniority system equal
> by the action of the employer and the
> 1965, ameliorated a part of the previou
> tory conditions, will not. Such a con
> sound astonishing, yet that is precis
> holds. [JA 183-184].

INTRODUCTIO
SUMMARY OF A

A majority of the court belo
of Title VII of the Civil Rights
to seniority systems "in existe
VII's effective date," and that
that date (or, as here, changes
existing systems) even if inno
lawful if they perpetuate pre-Ac
lower court has adopted that
and numerous lower court
§ 703(h) to protect post-Act sys
discriminatory intent.[5] Those d
sion below are faithful to Cong

We begin our argument by
court's narrow reading of § 70
with the carefully crafted stat
wrote, which protects without
seniority . . . systems" that a
intention to discriminate."

We then demonstrate that, co
peals' supposition, the Congressi
ing Title VII's effect on seniori
should be read to mean what
a single instance in which a p

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[5] *Hameed v. International Ass'n. of*
F.2d 506 (8th Cir. 1980); *Alexander*
F.2d 1364 (6th Cir. 1977), *cert. d*
EEOC v. McCall Corp., 24 FEP C
aff'd sub nom., EEOC v. McCall Pr
(6th Cir. 1980); *Johnson v. Burroug*
(S.D. Fla. 1980); *Sanders v. Sherwi*
571 (E.D. Mich. 1980); *Pate v. Tra*
1228, 1245 (N.D. Cal. 1979); *Edmo*
Corp., 20 FEP Cases 1745 (N.D. Al
Convoy, 20 Empl. Prac. Dec. ¶ 30,090
Edmonds v. S. Pac. Transp. Co., 19
1979).

what the lower court held: t
tect post-Act seniority system
porters responded both broa
charge that the legislation wou
rights. In virtually every i
broad and unqualified: the b
seniority systems. In the wri
Senator Clark relied on by th
was tailored to the charge: th
affect existing seniority right
not affect existing seniority
Senator Clark's statements l
not intend to draw a distin
future seniority rights. Inde
that he had introduced the
the court below relied to mak
not affect seniority at *all*"
phasis added). Each one of
addressed the subject affirmed
that the bill would not affect s

We conclude with a demons
low, by imposing stiff penalti
that make step by step char
system (even in a manner t
women), frustrates both Ti
voluntary affirmative action a
granting employers and uni
seniority systems to their ev
has recognized, Congress inte
trude upon these important le

A

1. The S

Section 703(h) is "a c
other provisions of § 703
employment practices a
and which are not." *Fy*
Co., 424 U.S. 747, 758.[6]
immunity without quali
. . . system[s]" that ar
to discriminate". The
distinction between seni
the Act and seniority sy
It is hardly likely that C
sion" would choose word
intended was a "grandf
ity systems.

The unlikelihood that
ance with its intent is m
of the drafting of § 703(
was a part of the "Dirk
broke the longest filibust
Dirksen explained that
merely weeks but mont
11935), and concluded:

> I doubt very muc
> tive lifetime any
> meticulous attention
> of every word, of e
> of every phrase. [*I*

Finally, the argument
says is made more bindi
Congress is no novice at
Such provisions are co

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[6] See also *Teamsters*, 431
lines, Inc. v. Hardison, 432 U

cluding labor legislati
Congress would have
father" language if
§ 703(h).[8]

2. Th

(a) There is not
VII's legislative histo
has held, i.e. that §
systems adopted or ch
this Court has empha
legislative intention to
statute "must ordina
Consumer Product Sa
U.S. 102, 108. The ab
mit, dispositive, and
§ 703(h) its plain m
in what is perhaps a
that the court of appe
but in its reading of th

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[7] See, for example, the
Labor Management Relat
Stat. 152 (1947), immun
suant to pre-Act collecti
otherwise have been unfa
Act. See also, § 302(f) o
§§ 2(a), 9 and 12 of the
258 and 261).

[8] An additional aid to s
fact that § 703(h) legitim
resulting from "a bona fi
which measures earnings
It hardly seems likely tha
merit and incentive syst
date of the Act—indeed,
as to legislative purpose
rational—yet if § 703(h)
them, would Congress ha
phrase if its intent was
ferent treatment?

(b) The deci
ence as to Cong
materials introd
on Title VII. T
have no effect
systems; from t
that Title VII
not "established'
On its face that
that Title VII
systems is not a
turn later estab
Clark materials
text, including
introduced those
seniority at all"
that the lower
intended.

From the star
VII, those who s
that they hoped
opposition to th
charges that the
443 U.S. at 205-
senting), and th
seniority. The l
Report accompan
Senator Hill pri
bill,[10] and in spe
a candidate in

The court of
the bill, to whom

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[9] H.R. Rep. No. 9

[10] 110 Cong. Rec.

[11] These speeches
11471, 11486.

statutory word
vert Corp., 341
ances as to the
seniority syste
contrary, their
and did not di
systems.

The Pre-§ *70*
first by the H
had warned th
ous calamitous
"destroy" seni
Sess. 65 (1963
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Judiciary Com
voted to answe
cism" which ha
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> It has b
> stroy worl
> vis-a-vis t
> wrong. T
> union, as i
> nating ag
> their race,

During the c
was proposed t
one employee c
the indirect ef
race, color, re
Representative
port the amen

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[12] Throughout
until introductio
filibuster, there

> The amendment of the gentleman from New Jersey refers to other practices which "may" have the "indirect effect" of discriminating on the basis of race, color, and so forth.
>
> I should like to say for the record and for the purpose of establishing legislative history, that if a union, or an employer, for that matter, engages in a practice which is a subterfuge amounting to discrimination on the basis of race, color, or creed in some indirect fashion then a court would probably find that such a practice would fall within the scope of this bill.
>
> However, so far as the gentleman's amendment is concerned, there are factors such as seniority, length of employment, and other factors which could affect union membership, union rights, and so forth, and have nothing to do with color, race, or creed.
>
> . . . I hesitate to support the amendment for the reasons I have indicated. [*Id.* at 2594].

The amendment was rejected (*id.* at 2595).

With no further reference to seniority, the bill was passed by the House, and sent to the Senate. Shortly thereafter, the Republican sponsors in the House prepared a memorandum describing the bill as passed by the House. In pertinent part, the memorandum stated:

> Title VII does not permit the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of employees or union members [*id.* at 6566].

In the Senate, a 17-day debate ensued over whether the bill should be referred to Committee. During that period, Senator Humphrey, who was co-manager (with Senator Kuchel) of the entire Civil Rights bill, introduced a newspaper article quoting the answers of a Justice Department "expert" to the "ten most common objections to Title VII." In pertinent part it stated:

> Objection: The law would empower federal "inspectors" to require employers to hire by race. White people would be fired to make room for Negroes. Seniority rights would be destroyed. . . .
>
> Reply: The bill requires no such thing . . .
>
> . . . The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance. An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights. [*Id.* at 5094].

On March 17, responding to a political advertisement charging that the bill would give the federal government the power to run America's businesses, Senator Humphrey, on the floor of the Senate, stated:

> Title VII . . . will prohibit discrimination in employment . . . It does not limit the employer's freedom to hire, fire, promote, or demote for any reason—or no reason—so long as his action is not based on race, color, religion, national origin, or sex. It does not interfere with job seniority . . . . [*Id.* at 5423].

The advertisement had listed "seniority in private employment" as one of the individual rights that would be lost were the bill passed (*ibid*). Senator Humphrey countered:

> [N]othing in the bill would affect any seniority plan which was not a cloak for racial or religious discrimination. [*Ibid*].

On March 26, 1964, the Senate voted to reject the motion to refer the bill to Committee (*Id.* at 6455), and on March 30, the formal debate on the bill began. Senators Humphrey and Kuchel, the co-managers, undertook "to lay the affirmative case for the bill before the Senate" (*Id.* at 6528). Each of them devoted a portion of his

speech to answering the charges respecting seniority Senator Humphrey said:

> I hope this presentation will set to rest the doubts about this bill which have been voiced by many union members across the country. This bill is not an instrument to abolish seniority or unions themselves, as some have charged. The only standard which the bill establishes for unions and management alike is that race will not be used as a basis for discriminatory treatment. The full rights and privileges of union membership, as protected by other Federal laws and court decisions, will in no way be impaired. As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about Title VII. [*Id.* at 6549].

Senator Kuchel, in the other major opening speech in support of the bill, made the same point:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. . . . [T]he important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.
>
> Neither would seniority rights be affected by this Act. [*Id.* at 6553-54].

At the close of his speech, Senator Kuchel introduce memorandum prepared by the Republican sponsors i House, describing the bill as enacted by the House at 6665-66. (That memorandum, as noted earlier, s that "Title VII . . . does not permit interferences seniority rights of employees or union members," 6566.)

Each of the next several days was devoted t sponsors' exposition of a particular title of the bill April 8, 1964, the speeches in support of Title VII made by Senators Clark and Case, the bipartisan tains" for Title VII. Senator Clark noted the c Senator Hill had earlier made that "Title VII woul dermine the vested rights of seniority" (*Id.* at 7206) he responded:

> [I]t is clear that the bill would not affect sen at all. It would not affect the present operati the National Labor Relations Act or rights existing labor laws. [*Id.* at 7207; emphasis ad

As proof of this conclusion, Senator Clark insert the record certain documents which, ironically, cons the entirety of the "legislative history" which the below declared "conclusively demonstrates that Con intended the immunity accorded seniority system § 703(h) to run only to those systems in existence time of Title VII's effective date" (JA 143-144 and

The first of these was a Justice Department orandum, which stated in relevant part:

> First, it has been asserted that Title VII undermine vested rights of seniority. Title would have no effect on seniority rights existi the time it takes effect. If, for example, a coll bargaining contract provides that in the eve layoffs, those who were hired last must be la first, such a provision would not be affected i

> least by Title VII. This would be true even i
> case where owing to discrimination prior to the
> tive date of the title, white workers had
> seniority than Negroes. Title VII is direct
> discrimination based on race, color, religion, s
> national origin. It is perfectly clear that wh
> worker is laid off or denied a chance for prom
> because under established seniority rules he is
> man on the totem pole" he is not being discrimi
> against because of his race. Of course, if the
> iority rule itself is discriminatory, it would be u
> ful under Title VII. If a rule were to state th
> Negroes must be laid off before any white man,
> a rule could not serve as a basis for discharge
> sequent to the effective date of the title. I d
> know how anyone could quarrel with such a r
> But, in the ordinary case, assuming that seni
> rights were built up over a period of time d
> which Negroes were not hired, these rights woul
> be set aside by the taking effect of Title VII.
> ployers and labor organizations would simpl
> under a duty not to discriminate against Ne
> because of their race. Any differences in treat
> based on established seniority rights would n
> based on race and would not be forbidden b
> title [*id.* at 7207].

The second document introduced by Senator Clark
an interpretative memorandum which he and Se
Case had had prepared (*id.* at 7212). In pertinent
that memorandum stated:

> [Section 703] prohibits discrimination in em
> ment because of race, color, religion, sex, or na
> origin. It has been suggested that the conce
> discrimination is vague. In fact it is clear and
> ple and has no hidden meanings. To discrimin
> to make a distinction, to make a difference in
> ment or favor, and those distinctions or differ
> in treatment or favor which are prohibited by
> tion [703] are those which are based on any o
> five forbidden criteria, race, color, religion, sex

national origin. Any other criterion or qu
for employment is not affected by this

• • • •

Title VII would have no effect on estab
iority rights. Its effect is prospective and
spective. Thus, for example, if a busines
discriminating in the past and as a resu
all-white working force, when the title
effect the employer's obligation would be
fill future vacancies on a nondiscrimina
He would not be obliged—or indeed, per
fire whites in order to hire Negroes, or
Negroes for future vacancies, or, once N
hired, to give them special seniority rig
expense of the white workers hired earli
ever, where waiting lists for employment
are, prior to the effective date of the t
tained on a discriminatory basis, the us
lists after the title takes effect may be h
lawful subterfuge to accomplish discrimina
at 7213].

Finally, Senator Clark introduced written
certain questions that had been posed by Senat
(*id.* at 7215-16):

Question: Would the same situation
respect of promotions, when that manage
tion is governed by a labor contract callin
motions on the basis of seniority? Wh
missals? Normally, labor contracts call
hired, first fired." If the last hired are
the employer discriminating if his contra
they be first fired and the remaining em
white?

Answer: Seniority rights are in no w
by the bill. If under a "last hired, first fi
ment a Negro happens to be the "last hir

still be "first fired" so long as it is dc
his status as "last hired" and not becau

Question: If an employer is direct
his employment list because of discrim
happens to seniority?

Answer: The bill is not retroactiv
not require an employer to change exis
lists. [*Id.* at 7217].

After the speeches in support of the bill w
the filibuster began. From that time forwa
only occasional statements by sponsors as t
of the bill.

On April 25, Senator Keating took the
the "morning hour" to respond to a pamphle
the Coordinating Committee for Fundamen
Freedoms, charging that the bill would r
and would "interfere with the seniority r
ployees and union members":

"The coordinating committee has cha
Title VII would . . . permit the Gover
pose quotas and preferences upon e
labor organizations in favor of minority
coordinating committee also maintains t
will authorize the Federal Government
with the seniority rights of employe
members.

"Title VII does not grant this aut
Federal Government. To make such
the coordinating committee does, is no
fortunate misinterpretation of the tit
but is a cruel hoax because it generates
fear among those individuals who mu
their job or union membership to m
existence. [*Id.* at 9111].

On May 8, Senator Carlson introduced a
had had prepared because of "the gravity o
against the bill." In pertinent part, the an

> There would be no authority to r
> to achieve racial balance or to orc
> to create jobs for Negroes. Uni
> not be affected and employers w
> free to hire or fire on the basis o
> [*Id.* at 10520].

On May 20, Senator Javits took t
to charges contained in a campaign s
Wallace:

> Another thing that people were
> was seniority and trade unions.
> said that union seniority syster
> gated and that white men's jobs
> turned over to Negroes. That is
> thing that the bill will do—and
> of existing state laws has confirm
> outright cases of discrimination.

Senator Humphrey, too, was upset
which had occurred during the Mary
paign (*id.* at 11485). Governor Wall
misrepresented the bill" (*id.* at 1148
phrey undertook a point-by-point refu
part:

> Then the Governor said that t
> employers whom they can 'hire a
> the seniority systems of labor un
>
> The authors of the bill in the
> were the architects of the bill an
> movement itself—have said that
> totally untrue. It just is not so

That same day, Senator Humphrey
letter "stating some of my observa
Rights bill, as to what it provides a
provide" (*id.* at 11486). In part, the

> The bill does not permit the F
> to require an employer or unio
> for membership a quota of emplo
> ticular minority group.

> The bill does not permit th
> to destroy the job seniority ri
> nonunion employees. [*Id.* at 1

On May 22, Senator McGovern n
to demonstrate that "[t]he horre
for [the bill] by its opponents sin
at 11768). In pertinent part:

> The bill does not create any h
> does not affect union seniority

On May 25, Senator Humphrey
nation of the House bill prepared
said had been "read and approved
managers of the bill in both house
11847). In pertinent part, the exp

> The Title contains no provisio
> ardize union seniority systems
> in the Title permit the gover
> internal affairs of employers
> 11848].

The Post-§ 703(h) Discussion. (
sen-Mansfield substitute was intr
several provisions to the bill, inc
June 4, Senator Humphrey made t
explaining the purpose of the ne
703(h), he explained,

> makes clear that it is only disc
> of race, color, religion, sex or
> is forbidden by the title. T
> narrow application of the titl
> its present intent and effect.

On June 18, Senator Williams o
a letter he had received from Sena
certain questions he (Senator Willi
the bill. "Since [Senator Dirkse
several of the amendments approve
it was important that his interpre

tive intent be incorporated in
14329). In pertinent part, the l
sen, dated June 18, 1964 (the d
final vote) read as follows:

> DEAR JOHN: I have
> raising questions which ha
> attention . . . Let me set
> then follow them with my
> have a complete record in
>
> • •
>
> 10. That seniority in u
> company employment would
>
> The Senate substitute bil
> seniority systems. [*Id.* at

Senator Williams then provi
the improvements made by the
(*id.* at 14329). In pertinent par

> The language in the Ho
> merit, and incentive systen
>
> • •
>
> Senate amendments perm
> merit, and all incentive sys

On June 19, 1964, the filibu
by a vote of cloture (*id.* at 13
the Dirksen-Mansfield substitut
Senate had substantially revi
House debated a recommendati
Senate amendments. In the co
resentative McCulloch, who ha
publican sponsor in the House, s

> Much inaccurate inform
> about the legislation both a

it is now before the H
to negate only the wo
have had such wide dis

•

Fifth. The bill does
ernment to destroy the
union or non-union em

A few minutes later, the I
Senate's amendments, thus
of 1964 (*id.* at 15897).

That same day, Senator
passage of the bill, introduc
May 25 memorandum, descr
at 15865). The memorand
Title VII "contains no provi
seniority systems" (*id.* at 15

The Lessons of the Legi
the Congressional discussion

First, in the House, the
uniformly to the effect that
mit interferences with seni
union members." See *supra*

Second, in the Senate, fro
on Title VII to the introduct
substitute, the following pr
of seniority—Senators Hum
ing, Carlson, Javits and McC
by the proponents spoke of "
ing seniority," and those
their content: "Title VII . .
seniority." "Neither would
this Act." "[I]t is clear th
seniority at all." "Title VII
to the Federal Government
seniority rights of employees
seniority would not be affect

In addition, Senator
memoranda on which t
reliance. While those
objection to Title VII
bill's effect on "vested,"
iority rights, that is be
charge made by the bil
an assurance tailored t
bill would affect existin
bill would *not* affect ex
no suggestion in those m
tecting *pre*-Act *bona fi*
date *post*-Act *bona fide*
Senator Clark in intro
is clear that the bill w
at the same time he als
questions posed by Se
answers stated:

> Seniority rights
> If under a "last hir
> happens to be the
> fired" so long as i
> "last hired" and n

See *supra* pp. 18-21.

Third, the few post-§
are to the effect that
pressly protects valid s
23-24.

Finally, it should be
§ 703(h), Title VII did
Thus, the pre-§ 703(h)
not affect seniority at
the concept that establi
cially protected, and m
ing succinctly stated i
randum:

> If . . . a collective
> in the event of l

must be laid ofl
affected in the
true even in th
prior to the eff
ers had more s
directed at disc
ligion, sex or n
that when a w
for promotion
rules he is "lov
being discrimin
Any difference
seniority rights
not be forbidden

In other words, tho
ing that even where
tion against blacks
thereafter of neutra
discrimination on the
what is now §§ 703(
explained, the addit
application of the T
[pre-Dirksen-Mansfi

The totality of e
randa, thus does not
on § 703(h) found by

3. T

This Court has de
VII both the overa
inevitable intersecti
Emporium-Capwell C
69-70; *Albemarle Pa*
418; *Trans World A*
Steelworkers v. Webb
Brewers Assn. v. Br
tion of § 703(h) tha
systems in place on
to the overall purpo
labor policy.

(a) *The purp*
as a "spur or
portunities for
418; *Weber, su*
not confined to
employers and u
conformity with

> The Court
> agreement
> status of ce
> ing public
> by statute,
> detrimental
> employees
> [*Franks, s*
> *Weber, sup*

It is most u
such ameliorati
as they existed
immunity if the
iority systems i
as the dissent b
implicitly ackno
construing § 70
If a seniority s
for job seniority
seniority (which
pre-Act discrim
remove the pro
ployer and uni
providing even
seniority), the
petuate the effe
any change in l

[13] See, e.g., *Unit*
658-659 (2nd Cir.
494 F.2d 211, 223-

"steps" necessary to reach the most desirable jobs, would, under the decision below, remove the protection of § 703(h) from the LOPs altogether, and subject them to invalidation except to the extent justified by "business necessity."[14] The decision below thus would make Title VII a deterrent to step by step progress. It would tend to freeze pre-1965 seniority patterns into perpetual place.

(b) *The relation of Title VII to the national labor policy.* As this Court has recognized, Title VII in general (*Emporium-Capwell, supra*) and § 703(h) in particular, must be construed with the knowledge that Congress did not intend to intrude unnecessarily upon core principles of national labor policy.

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree . . . that an agreed-upon seniority system must give way . . . [*TWA v. Hardison, supra*, 432 U.S. at 79].

And, as the Court elaborated in *California Brewers, supra*, 444 U.S. at 606:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers v. Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co.*

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[14] See, e.g., *Stevenson v. International Paper Co.*, 516 F.2d 103, 114-115 (5th Cir. 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1355 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809.

> *v. NLRB*, 397 U.S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Aeronautical Lodge v. Campbell*, 337 U.S. 521. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S., at 355, n. 41.
>
> . . . Significant freedom must be afforded employers and unions to create differing seniority systems.[15]

In the natural course of events both "the give and take of free collective bargaining" and "the specific characteristics of a particular business or industry" will force changes in a seniority system over time. Unions often seek broad seniority principles in order to maximize the role length of service plays in determining job opportunities, while employers customarily seek narrower applications of seniority to maximize the retention of employees on jobs with which they are familiar and on which they have developed experience and skills. U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions-Seniority* (1949), p. 14. Shifts in relative bargaining power, or in the importance the parties place on this

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[15] The Court added: "But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system," *id.* at 608. The decision below was not responding to that *caveat*. The court below assumed that the system at issue here would have been protected by § 703(h) had it been adopted prior to July 2, 1965, i.e. that it did *not* "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system." The vice of the system here, according to the court below, was its timing, not its content.

issue compared to others, are likely to alter the system Another significant catalyst to change in seniority systems is change in the "specific characteristics" of the employer. Congress was acutely aware in enacting Title VII that automation was radically altering the workplace in America. *Weber*, 443 U.S. at 202. Automation calls for changes in established seniority systems to adapt the system to differences in job requirements and to altered relationships between jobs, and to protect employees whose jobs are eliminated as others are created. To take a simple example, whenever a new job is created, the union and employer must change some LOP by inserting that job into the LOP.

The genius of collective bargaining, and a substantial reason for "encouraging [this] practice and procedure" (§ 1 of the NLRA), is that the bergaining process provides a salutary means for adapting the rules of the shop to changes in the needs and desires of the parties and to the demands of a dynamic economy and an onrushing technology. Indeed, the failure of a business or industry and the workers involved to accommodate their methods of doing business to new circumstances is likely to cost all concerned their livelihood. We do not believe that Congress can fairly be charged with an intent to impose stiff penalties on legitimate changes in seniority rules, and thus to deter employers and unions from making such natural changes. Yet that is what the lower court's reading of Title VII does.

CONCLUSION

For the reasons set forth above, the decision should be reversed.

Respectfully submitted,

LAURENCE GOLD
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